

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Lawrence Behr Application	)	File No. 0001332167
For Modification of 220-222 MHz	)	
Station WPWR222	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 16, 2014****Released: December 17, 2014**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we address the Application for Review filed by Lawrence Behr (Behr) on June 19, 2009,<sup>1</sup> regarding the Wireless Telecommunications Bureau (Wireless Bureau) Mobility Division's May 27, 2009 *Order on Reconsideration* affirming that Behr was not entitled to a hearing under Section 1.110 of the Commission's rules when he rejected the grant of a modification application for his 220-222 MHz (220 MHz) license in Denver, Colorado.<sup>2</sup> For the reasons discussed below, we deny Behr's Application for Review.

**II. BACKGROUND**

2. The history of this proceeding intersects significantly with the Commission's establishment of the 220 MHz Service. In April 1991, the Commission adopted the *220 MHz Report and Order* establishing rules for Phase I licensing of nationwide and non-nationwide channels in the 220 MHz band.<sup>3</sup> The Commission determined that it would grant applications on a first-come, first-served basis, while mutually exclusive applications would be resolved through random selection (lottery) procedures.<sup>4</sup>

3. On May 1, 1991, the Commission began accepting nationwide and non-nationwide Phase I applications for 220 MHz licenses, and on that same day Behr submitted his application seeking site-based authority to operate in Denver, Colorado.<sup>5</sup> On May 24, 1991, after receiving over 59,000 applications, the former Private Radio Bureau imposed a freeze on the acceptance of all applications, including initial and modification applications, for the 220 MHz Service.<sup>6</sup> On October 19, 1992, the

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<sup>1</sup> Application for Review, filed by Lawrence Behr (June 19, 2009) (Application for Review).

<sup>2</sup> In re Application of Lawrence Behr for a Modification to Station WPWR222, *Order on Reconsideration*, 24 FCC Rcd 7196 (WTB MD 2009) (*Order on Reconsideration*).

<sup>3</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*). Of the 140 channel pairs set aside for non-nationwide (local) service, 100 were set aside for site-based trunked operations, and trunked channels were assigned in groups of five non-contiguous channels spaced 150 kHz (30 channels) apart. *Id.* at 2356, ¶ 3 and 2358, ¶¶ 15-16.

<sup>4</sup> *Id.* at 2364-65, ¶¶ 59, 62.

<sup>5</sup> FCC File No. 0983133, Application for Private Land Mobile and General Mobile Radio Services, filed by Lawrence Behr (May 1, 1991).

<sup>6</sup> Acceptance of 220-222 MHz Private Land Mobile Applications, *Order*, 6 FCC Rcd 3333, 3333, ¶ 3 (Private Radio Bureau 1991).

Private Radio Bureau's Land Mobile Branch conducted a lottery to resolve mutually exclusive non-nationwide applications.<sup>7</sup> Behr's application, which was mutually exclusive with other applications, was selected as the initial tentative selectee for Denver. The initial tentative selectees were announced on January 26, 1993,<sup>8</sup> and on January 28, 1993, the Land Mobile Branch returned Behr's application with a request for additional technical information.<sup>9</sup> Behr resubmitted the application with the requested information on March 23, 1993, within the required 60 days of the application return date.<sup>10</sup> The Land Mobile Branch subsequently misplaced Behr's amended application and, as a result, did not issue a Phase I 220 MHz license to Behr for operation in Denver.

4. On July 30, 1992, before the Commission conducted its lottery of non-nationwide Phase I 220 MHz mutually exclusive applications, certain aspects of the Commission's procedures for the filing and acceptance of 220 MHz applications were appealed to the United States Court of Appeals for the District of Columbia Circuit ("court" or "court of appeals").<sup>11</sup> In announcing the date for the non-nationwide lottery, the Commission stated that it would condition all grants of 220 MHz licenses upon the outcome of the appeal and that during the pendency of the appeal, licensees could construct facilities at their own risk.<sup>12</sup> The Commission further announced that, regardless of a licensee's initial authorization date, the construction deadline for all non-nationwide 220 MHz stations would be extended after final disposition of the case.<sup>13</sup> The case was not settled until March 1994, well after the Commission had granted all non-nationwide 220 MHz licenses. The appeal effectively placed those authorizations in doubt for nearly two years, and the uncertainty with respect to the finality of the Commission's grant of their licenses caused many licensees to refrain from constructing their stations. Following dismissal of the case on March 18, 1994,<sup>14</sup> the Commission extended the deadline for licensees to construct their stations and place them in operation on five separate occasions. The first three extensions resulted in a deadline of December 31, 1995.<sup>15</sup>

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<sup>7</sup> Commission Announces Lottery for Rank Ordering of 220-222 MHz Private Land Mobile "Local" Channels, *Public Notice*, 7 FCC Rcd 6378 (Sept. 10, 1992) (*Lottery Public Notice*).

<sup>8</sup> Commission Announces Tentative Selectees for 220-222 MHz Private Land Mobile "Local" Channels, *Public Notice*, DA 93-71 (rel. Jan. 26, 1993). From the more than 59,000 applications filed prior to the freeze, the Commission ultimately issued authorizations to approximately 3,800 licensees to operate non-nationwide 220 MHz stations. Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 220-222 MHz, PP Docket No. 93-253, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188, 195, ¶ 5 (1995) (*220 MHz Second Memorandum Opinion and Order*).

<sup>9</sup> Lawrence Behr, *Application Return Notice for the Private Land Mobile Radio Services*, File No. 983133-QT (Jan. 28, 1993). In particular, the return notice explained that "[m]obiles to be operating with the system need to be shown on the application" and directed Behr to complete "items 2 thru 5, 12 and 13" on the application. *Id.* at 1.

<sup>10</sup> See Former 47 C.F.R. § 90.141 (1993) (providing that "Any application which has been returned to the applicant for correction will be processed in original order of receipt if it is resubmitted and received by the Commission's offices in Gettysburg, PA within 60 days from the date on which it was returned to the applicant. Otherwise it will be treated as a new application and will require an additional fee as set forth in Part 1, Subpart G of this chapter").

<sup>11</sup> *Evans v. Federal Communications Commission*, No. 92-1317 (D.C. Cir. filed July 30, 1992).

<sup>12</sup> *Lottery Public Notice*, 7 FCC Rcd at 6378.

<sup>13</sup> *Id.*

<sup>14</sup> See *Evans v. Federal Communications Commission*, Case No. 92-1317 (D.C. Cir. rel. Mar. 18, 1994) (*per curiam*) (granting the motion for voluntary dismissal).

<sup>15</sup> On March 30, 1994, the Private Radio Bureau extended the construction deadline for stations authorized on or before the release date of its order, to December 2, 1994. Amendment of Part 90 of the Commission's Rules to

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5. Shortly after the appeal was dismissed, the Land Mobile Branch conducted the second round of processing non-nationwide applications after finding that, for various reasons unrelated to the present proceeding, the remaining initial tentative selectee applications could not be granted. On September 6, 1994, unaware of Behr's timely filed amended application, the Land Mobile Branch granted a Phase I non-nationwide license in Denver to the second tentative selectee, Gary Petrucci (Petrucci), under call sign WPFQ335.<sup>16</sup> On July 21, 1995, after completing the processing of all non-nationwide Phase I 220 MHz applications, the Land Mobile Branch issued its *220 MHz Disposition Order*, in which the Wireless Bureau stated that it had acted upon all Phase I non-nationwide applications submitted prior to the freeze and granted all applications for which spectrum was available.<sup>17</sup> The *220 MHz Disposition Order* also stated that all remaining Phase I non-nationwide applications were dismissed and would not be returned.<sup>18</sup> Later that year, the Wireless Bureau released another order resulting in a fourth extension of the construction deadline for Phase I non-nationwide 220 MHz licensees to February 2, 1996.<sup>19</sup>

6. While the Commission extended the construction deadline, it recognized that because several years had passed since 220 MHz licensees had filed their applications for which licenses were granted, many licensees found that they were unable to construct at their authorized locations. In addition, as a consequence of the freeze on filing applications, licensees wishing to relocate their authorized locations through license modification were unable to do so.<sup>20</sup> To address these concerns, on January 26, 1996, the Commission issued its *220 MHz Second Report and Order* adopting a one-time procedure to allow Phase I non-nationwide licensees to relocate their single base stations within defined maximum distances or to change the effective radiated power level or height above average terrain of their base station, as long as doing so did not expand the station's authorized 38 dBu service contour.<sup>21</sup>

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Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 9 FCC Rcd 1739 (PRB 1994). In the *CMRS Third Report and Order*, the Commission, after adopting a 12-month construction requirement for Commercial Mobile Radio Service licensees, also extended the construction deadline for non-nationwide 220 MHz licensees an additional four months to April 4, 1995, affording those licensees 12 months in which to construct their stations. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8077, ¶ 184 (1994); see Private Radio Bureau Extends Time to Construct Non-Nationwide 220 MHz Stations Through April 4, 1995 and Lifts Freeze for Applications to Modify Site Locations, *Public Notice*, 10 FCC Rcd 744 (PRB 1994) (granting a four-month extension from December 2, 1994, to April 4, 1995, to construct non-nationwide 220 MHz systems with original license grant dates on or before March 30, 1994). On February 17, 1995, the Wireless Bureau released an order extending the deadline to December 31, 1995. Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 10 FCC Rcd 3356 (WTB 1995).

<sup>16</sup> Petrucci's application was assigned File No. 0962977.

<sup>17</sup> In the Matter of Disposition of Non-Nationwide 220-222 MHz Applications, *Order*, 10 FCC Rcd 7747 (WTB LMB 1995) (*220 MHz Disposition Order*).

<sup>18</sup> *Id.*

<sup>19</sup> On December 15, 1995, the Wireless Bureau released an order providing for an extension of the construction deadline for non-nationwide 220 MHz licensees, contingent upon closure of the Commission as a result of any furlough of Federal Government employees that might occur. See Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 11 FCC Rcd 9710 (WTB 1995). The ensuing 23-day Federal furlough resulted in an extension of the construction deadline to February 2, 1996, pursuant to the formula established in the Bureau order.

<sup>20</sup> Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 835, 836, ¶ 1 (1995).

<sup>21</sup> Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the

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The Commission then extended the February 2, 1996 construction deadline to give licensees sufficient time to decide whether they wanted to relocate their base stations under the newly adopted modification procedures.<sup>22</sup> In particular, the Commission extended the deadline from February 2, 1996, to March 11, 1996, for all non-nationwide 220 MHz licensees that elected to construct their base stations at their originally authorized locations, and to August 15, 1996, for all licensees granted authority to modify their licenses to relocate their base stations.<sup>23</sup>

7. On August 12, 1996, nearly 13 months after the Land Mobile Branch announced it had acted on all Phase I non-nationwide applications, Behr's counsel requested information on the status of Behr's Denver application. The Land Mobile Branch responded by letter dated October 18, 1996, indicating that Behr's application had not been resubmitted within the required 60-day period, and therefore was no longer pending.<sup>24</sup> The letter further stated that the *220 MHz Disposition Order* released on July 21, 1995, had notified applicants that the Private Radio Bureau had completed processing all applications received prior to the imposition of the freeze.<sup>25</sup> On October 25, 1996, Behr sought reconsideration of the October 18, 1996 letter, providing a date-stamped copy evidencing timely resubmission of his amended Denver application.<sup>26</sup>

8. On February 19, 1997, while Behr's petition seeking reconsideration of the dismissal of his Denver application remained pending, the Commission adopted the *220 MHz Third Report and Order* establishing rules for the Phase II licensing of nationwide and non-nationwide channels in the 220 MHz band on a geographic area basis.<sup>27</sup> In relevant part, the Commission assigned non-nationwide licenses in 175 geographic areas defined as Economic Areas (EA licenses) and Regional Economic Area Groupings (Regional licenses).<sup>28</sup> As codified in Section 90.767 of our rules, EA and Regional licensees must provide coverage to at least one-third of the population of their EA or Region within five years of initial authorization, and at least two-thirds of the population of their EA or Region within 10 years of initial

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Private Land Mobile Radio Services, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 11 FCC Rcd 3668 (1996) (*220 MHz Second Report and Order*), modified, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 14569, 14616, ¶ 97. While Phase I licensees were allowed only one base station, they were also permitted to add "fill-in" transmitters within their 38 dBu service contour without prior authorization from the Commission to fill in "dead spots" in coverage or to reconfigure their systems to increase capacity within their service area, so long as signals from the transmitters did not expand the station's 38 dBu service contour. *220 MHz Second Report and Order*, 11 FCC Rcd at 3670-71, ¶¶ 9-11. A licensee, however, was required to notify the Commission within 30 days of the completion of any changes through a minor modification of its license. These rules allowing modification are codified under Sections 90.745, 90.751, 90.753, and 90.757 of our rules. 47 C.F.R. §§ 90.745, 90.751, 90.753, 90.757.

<sup>22</sup> *220 MHz Second Report and Order*, 11 FCC Rcd at 3674, ¶ 21.

<sup>23</sup> *Id.*

<sup>24</sup> Letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch, to Donald J. Evans, Esq., Counsel for Lawrence Behr (Oct. 18, 1996).

<sup>25</sup> *Id.*

<sup>26</sup> Letter from Donald J. Evans, Counsel to Lawrence Behr, to Michael Regiec, Federal Communications Commission (Oct. 25, 1996).

<sup>27</sup> Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997) (*220 MHz Third Report and Order*). The Commission made these channels available to all eligible applicants and, given a recent statutory mandate, stated that mutually exclusive applications would be resolved through competitive bidding rather than random selection. *Id.* at 10950, ¶ 7, 11001-02, ¶ 37. See also 47 U.S.C. § 309(i)(5), (j).

<sup>28</sup> *Id.* at 10949, ¶ 7.

authorization.<sup>29</sup> Licensees may, in the alternative, provide substantial service to their licensed areas at the appropriate five- or 10-year benchmarks.<sup>30</sup>

9. On September 19, 1997, the Commission granted assignment of the Phase I non-nationwide license for Station WPFQ335 in Denver from the second tentative selectee, Petrucci, to Roamer One. On October 10, 1997, the former Commercial Wireless Division's (CWD) Licensing and Technical Analysis Branch issued a letter to Behr denying his petition for reconsideration of the dismissal of his Denver application as filed in an untimely manner.<sup>31</sup> The letter explained that the *220 MHz Disposition Order* released on July 21, 1995, disposed of Behr's Denver application, not the Land Mobile Branch's letter of October 18, 1996.<sup>32</sup> On November 10, 1997, Behr filed an Application for Review of the denial of his petition for reconsideration.<sup>33</sup> In late 1998, while Behr's 1997 Application for Review was pending, the Commission auctioned numerous 220 MHz EA geographic licenses in Auction 18, including the Denver EA license, on the same frequencies Behr sought in his Phase I application. Net Radio was the high bidder for the Denver market in Auction 18, and became the Phase II geographic area licensee for that channel block. On January 13, 2000, several months after the Commission held its 220 MHz Auction 18, Roamer One assigned the Phase I license for Station WPFQ335 to Net Radio.

10. Upon review of Commission records regarding the date on which Behr filed his amended Denver application, CWD determined that Behr had filed the application in a timely manner, and that it should have been processed. On September 26, 2002, after settlement negotiations with Behr failed, CWD adopted an order to correct, on its own motion, the administrative error made in misplacing Behr's application and granting Petrucci's application for Station WPFQ335.<sup>34</sup> In particular, the *CWD Order* set aside the grant of the authorization for Station WPFQ335 licensed, at that time, to Net Radio, and returned Behr's application to pending status to be processed.<sup>35</sup> Importantly, in accordance with Section 90.725(f), the *CWD Order* specifically warned Behr that if his application were granted and he did not construct the station in a timely manner, any license granted to Behr would automatically cancel and the spectrum associated with Behr's license would revert to Net Radio, the geographic area licensee.<sup>36</sup> Finally, having reinstated his application, the *CWD Order* dismissed Behr's 1997 Application for Review as moot.<sup>37</sup>

<sup>29</sup> *Id.* at 11020, ¶ 163; 47 C.F.R. § 90.767(a).

<sup>30</sup> *Id.* The Commission also determined that failure to meet the construction benchmarks results in automatic cancellation of the licensee's entire EA or Regional license. *Id.* at 11021, ¶ 164; 47 C.F.R. § 90.767(c). We also note that the Commission permits EA and Regional licensees to operate any number of base stations anywhere within their authorized geographic areas, provided that their transmissions do not exceed a predicted field strength of 38 dBuV/m at their border, and provided that they protect the base stations of Phase I licensees in accordance with the existing co-channel separation criteria for 220 MHz stations. *220 MHz Third Report and Order*, 12 FCC Rcd at 10950, ¶ 7, 10982, ¶ 80, 11007-08, ¶ 138, and 11031, ¶ 182.

<sup>31</sup> Letter from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, to Donald J. Evans, Esq., Counsel to Lawrence Behr (Oct. 10, 1997).

<sup>32</sup> *Id.*

<sup>33</sup> Application for Review, filed by Lawrence Behr (Nov. 10, 1997) (1997 Application for Review).

<sup>34</sup> In the Matter of Lawrence Behr, Application to Operate a Phase I 220 MHz License in Denver, Colorado; Net Radio Communications Group, LLC, Authorization for 220 MHz Station Call Sign WPFQ335, Denver, Colorado, *Order*, 17 FCC Rcd 19025 (WTB CWD 2002) (*CWD Order*).

<sup>35</sup> *Id.* at 19027, ¶¶ 6-7. The *CWD Order* also granted Net Radio special temporary authority until the earlier of 180 days from the date of the order; or such time as Behr provided Net Radio written notification that he was ready to commence operations under an authorization granted pursuant to the order. *Id.* at 19027-28, ¶ 8.

<sup>36</sup> *Id.* at 19028, ¶ 8 n.15.

<sup>37</sup> *Id.* at 19028, ¶ 8.

11. In accordance with the *CWD Order*, Behr's application was processed and granted on January 8, 2003, under Call Sign WPWR222, and authorized 220 MHz Phase I site-based, trunked five-channel operation in Denver.<sup>38</sup> On June 2, 2003, Behr filed the above-captioned modification application seeking authority to make certain administrative and technical changes to the license, specifically: update the contact information for the license, provide answers regarding foreign ownership, and change the station class from FB6 (for-profit private carrier) to FB6C (for-profit interconnected service). Behr also attached a request for a waiver of the construction requirements for Phase I non-nationwide licenses, which required station construction and operation within 12 months of grant of the application, arguing that he should be afforded the full 10 years to construct his site-based station, similar to a Phase II non-nationwide geographic area licensee.<sup>39</sup> CWD's Technical Analysis Branch denied the waiver request on November 12, 2003,<sup>40</sup> and granted the modification application on November 17, 2003.

12. On December 17, 2003, Behr submitted a letter rejecting the grant of the modification application and requesting a hearing pursuant to Section 1.110 of our rules.<sup>41</sup> Section 1.110 of our rules provides as follows:

Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, ..., the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.<sup>42</sup>

On January 31, 2007, the Mobility Division dismissed the hearing request as procedurally defective in a *Letter Order*.<sup>43</sup> In particular, citing *Buckley-Jaeger Broadcasting Corporation of California v. FCC*,<sup>44</sup> the *Letter Order* found that because the Wireless Bureau had granted Behr's application in full, Section 1.110 did not apply, and that Behr was effectively seeking a hearing on the denial of his waiver request.<sup>45</sup> The *Letter Order* further explained that either a petition for reconsideration or application for review were the appropriate vehicles for challenging denial of the waiver request, and Behr did not seek relief using either vehicle by the required filing deadline of December 12, 2003.<sup>46</sup>

13. On February 13, 2007, Behr filed a petition for reconsideration of the *Letter Order*<sup>47</sup> claiming that the Mobility Division erred in dismissing his Section 1.110 petition because it was the

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<sup>38</sup> We note that Behr's license for Station WPWR222 authorized trunked operations on five non-contiguous channels: 220/221.0875, 220/221.2375, 220/221.3875, 220/221.5375, and 220/221.6875 MHz.

<sup>39</sup> Petition for Waiver of Section 90.725 of the Commission's Rules, filed as Attachment to Behr License Modification Application, FCC File No. 0001332167 (filed June 2, 2003) (Waiver Request).

<sup>40</sup> Letter from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Branch, Commercial Wireless Division, to Donald J. Evans, Esq., Counsel to Lawrence Behr (Nov. 12, 2003) (*Waiver Denial Letter*).

<sup>41</sup> Letter from Donald J. Evans, Counsel to Lawrence Behr, to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 17, 2003). Behr did not file a petition for reconsideration of the denial of his waiver request under rule Section 1.106 or seek Commission review under rule Section 1.115.

<sup>42</sup> 47 C.F.R. § 1.110.

<sup>43</sup> Donald J. Evans, Esq., *Letter*, 22 FCC Rcd 1798 (WTB MD 2007) (*Letter Order*).

<sup>44</sup> 397 F.2d 651 (D.C. Cir. 1968) (*Buckley-Jaeger v. FCC*).

<sup>45</sup> *Letter Order*, 22 FCC Rcd at 1798.

<sup>46</sup> *Id.* at 1799.

<sup>47</sup> Petition for Reconsideration, filed by Lawrence Behr (Feb. 13, 2007) (2007 Petition).

action of denying the waiver request while granting the application that “left Behr with no choice but to reject the grant and request a hearing.”<sup>48</sup> Asserting that the “application sought no modification to the license other than the change in the build-out deadline,” Behr concluded that he had to reject the grant as made, or “forfeit[] his right to contest the partial grant because he would have been deemed by operation of the rule to have accepted it.”<sup>49</sup>

14. On May 27, 2009, the Mobility Division issued an *Order on Reconsideration* denying Behr’s petition and affirming the *Letter Order*. The Mobility Division concluded that Behr’s application seeking modification of his license for Station WPWR222 was filed and granted independent of Behr’s waiver request.<sup>50</sup> The Mobility Division also found Behr’s recitation of the facts to be inaccurate, specifically rejecting Behr’s claim that the application sought no modification other than the change in the build-out deadline sought in the accompanying waiver request. The Mobility Division stated that in fact Behr had requested several modifications in his application, including (1) amending the contact information for the license; (2) answering questions concerning foreign ownership; and (3) changing the station class from private carrier to interconnected service.<sup>51</sup>

15. Reiterating that *Buckley-Jaeger v. FCC* was controlling precedent,<sup>52</sup> the Mobility Division concluded that “the instant matter concerns a fully-granted modification application and a separately-attached request for waiver of the Commission’s construction requirements that was denied.”<sup>53</sup> The Division further endorsed its prior determination that under *Buckley-Jaeger v. FCC*, a challenge to the denial of the waiver request must be made through the filing of a petition for reconsideration or an application for review, pursuant to either Section 1.106 or Section 1.115 of the Commission’s rules, rather than through a request for a hearing under Section 1.110.<sup>54</sup> In response, Behr filed the Application for Review now before us.

### III. DISCUSSION

16. Behr seeks review of the Mobility Division’s *Order on Reconsideration*, claiming that his case involves two issues: whether the grant of Behr’s modification application and denial of a request for waiver filed along with the application constitutes a “partial grant” under Section 1.110 of the Commission’s rules; and whether the Wireless Bureau erred by failing to grant Behr’s 2003 request for waiver of the Phase I 220 MHz non-nationwide construction rule and affording him the same five- and 10-year construction benchmarks that apply to Phase II non-nationwide geographic area licensees.<sup>55</sup> As discussed below, we affirm the Mobility Division’s *Order on Reconsideration*, and deny Behr’s pending Application for Review.

#### A. Section 1.110 of the Commission’s Rules

17. The sole issue in this appeal with regard to Section 1.110 is whether the grant of each modification of license requested in Behr’s 2003 application, coupled with the denial of an accompanying request for waiver of a Commission rule, amounts to a partial grant of the license modification application and thus implicates the requirements of Section 1.110. Behr continues to argue that his modification application and waiver request constitute one application, and that, as a result, the application was only

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<sup>48</sup> 2007 Petition at 1.

<sup>49</sup> *Id.* at 1-2.

<sup>50</sup> *Order on Reconsideration*, 24 FCC Rcd at 7198, ¶ 5.

<sup>51</sup> *Id.* at 7197-98, ¶ 5.

<sup>52</sup> *Id.* at 7198, ¶ 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 7199, ¶ 8 (citing 47 C.F.R. §§ 1.106, 1.115).

<sup>55</sup> Application for Review at 1.

“partially granted” when the Mobility Division denied his waiver request and later granted his application. Behr contends that the “waiver request was an integral part of the modification application” – “the main action [Behr] was requesting,” – and that if “he accepted the grant as made, he would forfeit any right under Section 1.110 to challenge the Bureau’s denial” of the request to waive the Phase I construction requirements.<sup>56</sup> Behr concludes that “Section 1.110 therefore provided the only avenue for Behr to follow.”<sup>57</sup>

18. We disagree. Initially, we affirm the Mobility Division’s finding that *Buckley-Jaeger v. FCC* is on point. In that case, the court affirmed an order in which the Commission denied a licensee’s request for hearing under Section 1.110 after the Commission had granted the licensee’s renewal application but not the accompanying request for exemption from a Commission rule.<sup>58</sup> The owner of broadcast stations KKHI-AM and KKHI-FM submitted an application to renew its license for its AM station and included along with the application a request for exemption of the Commission’s rule prohibiting 100 percent duplication of program formats on both stations so that the owner could broadcast the same programs simultaneously on the AM and FM channels.<sup>59</sup> Staff granted the renewal application on November 5, 1965, without prejudice to whatever action the Commission might take on the licensee’s pending exemption request.<sup>60</sup> The Commission later concluded that the licensee’s request for exemption was not warranted.<sup>61</sup> Within 30 days of the grant of the renewal application, but prior to the Commission acting on the request for exemption, the licensee filed a letter objecting to the grant.<sup>62</sup> Terming the grant made as partial, the licensee demanded a hearing under Section 1.110 of the Commission’s rules.

19. The Commission, however, found no merit in the contention that the licensee – by rejecting grant of its renewal application without grant of the exemption and invoking Section 1.110 – was entitled to an evidentiary hearing on the question of whether continued duplication would serve the public interest.<sup>63</sup> The Commission further explained that “[it] was not necessary to consider [KKHI’s exemption] request in connection with renewal.”<sup>64</sup> The court of appeals, in affirming the Commission’s decision, noted that the Commission aptly phrased its answer: “This amounts to a contention that a licensee, by requesting a waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance.”<sup>65</sup>

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<sup>56</sup> *Id.* at 4-5.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> In the Matter of Requests for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission’s Rules (AM-FM Program Duplication), *Memorandum Opinion and Order*, 8 F.C.C.2d 1 (1967) (*Program Duplication Memorandum Opinion and Order*), *aff’d in relevant part, Buckley-Jaeger Broadcasting Corporation of California v. FCC*, 397 F.2d 651 (D.C. Cir. 1968).

<sup>59</sup> *Program Duplication Memorandum Opinion and Order*, 8 F.C.C.2d at 2, ¶ 5. Former Section 73.242 of the Commission’s rules provided, in relevant part, that “[a]fter October 15, 1965, licensees of FM stations in cities of over 100,000 population ... shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area.” Former 47 C.F.R. § 73.242 (1967). The rule section also outlines requirements for a temporary exemption for the rule. *Id.* § 73.242(c).

<sup>60</sup> *Program Duplication Memorandum Opinion and Order*, 8 F.C.C.2d at 2, ¶ 5.

<sup>61</sup> *Id.* at 4, ¶ 9.

<sup>62</sup> *Id.* at 2, ¶ 5. The licensee, in its letter objecting to the grant, also claimed that isolation of the exemption request, and later denial without hearing, would deprive it of its right to a hearing under Section 309 of the Communications Act of 1934, as amended (Communications Act). *Id.*

<sup>63</sup> *Id.* at 4, ¶ 10.

<sup>64</sup> *Id.*

<sup>65</sup> *Buckley-Jaeger v. FCC*, 397 F.2d at 656 (citing *Program Duplication Memorandum Opinion and Order*,

(continued....)

The court agreed that “[i]t is clear that Section 1.110 of the Commission’s rules has no application here,” explaining further that “[t]he rule concerns situations where the applicant receives less than a full authorization,” but “here Appellant received the full authorization to which it was entitled under the statute and rules.”<sup>66</sup> The court concluded that “[i]n these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory.”<sup>67</sup>

20. In his 2007 Petition, Behr argued that *Buckley-Jaeger v. FCC* did not apply because “the entire point of the application was to seek a modification of the build out schedule; there was *nothing else* applied for.”<sup>68</sup> Behr continued by asserting that “[t]he Commission literally denied the entire request for relief embodied in the application, yet now pronounces the application ‘granted in full.’”<sup>69</sup> In the instant Application for Review, however, Behr abandons his prior insistence that the request for waiver contained the *only* modification to his license that he requested. Instead, he describes the request for waiver as the “main action” that he requested,<sup>70</sup> and acknowledges that in fact the license application itself requested several license modifications, each of which was granted.<sup>71</sup>

21. Consistent with this acknowledgement, Behr also abandons his earlier attempts to distinguish his situation from the nearly identical facts in *Buckley-Jaeger v. FCC*, making no mention of the case at all in his Application for Review. Instead, Behr argues that a licensee in his position – which he continues to characterize as that of one who has received a “partial grant,” notwithstanding his recognition that the Wireless Bureau granted all of the changes he requested in his license modification application<sup>72</sup> – has no procedural option except to reject the grant of his application under Section 1.110 and request a hearing.<sup>73</sup> We disagree with this reading of our rules and with Behr’s characterization of the case law he cites to support his argument.

22. We first reject Behr’s assertion that grant of his modification application, coupled with the denial of his waiver request, constitutes a partial grant of the modification application and thus entitles him to a Section 1.110 hearing. We reject this assertion because we see no basis for concluding that Behr’s request to modify his license to change various of its factual elements – *i.e.*, the license’s listed contact person, certain foreign ownership information, and the station class of the license – and his request for waiver of the construction rule, constitute anything other than two independent requests, where the denial of one (the waiver request) is entirely unconnected to the consideration of the merits of

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8 F.C.C.2d at 4, ¶ 10)

<sup>66</sup> *Buckley-Jaeger v. FCC*, 397 F.2d at 656.

<sup>67</sup> *Id.*

<sup>68</sup> 2007 Petition at 3 (emphasis in original).

<sup>69</sup> *Id.* In elaborating on this assertion, Behr continued to overlook the terms of the license that his application had in fact requested the Commission to modify: “Looked at another way, the application as granted effected no modification whatsoever to the original license since the Commission denied the only change which had been requested. How can a modification application be deemed to be ‘granted in full’ if no actual modification of any kind was authorized by the grant? In other words, assuming *Buckley-Jaeger* remains good law, its application to the present situation is undercut by the critical distinguishing fact that Behr’s application was not ‘granted in full’ in any logical sense. To the contrary, it was actually denied in full in every logical sense but one: the Commission granted it.” *Id.*

<sup>70</sup> Application for Review at 5 (acknowledging that the Mobility Division granted “the portions of [his] application that added a contact representative and allowed interconnected service”).

<sup>71</sup> *Id.* at 4.

<sup>72</sup> See, e.g., *id.* at 6 (describing the Mobility Division’s “partial denial and partial grant of [his] application”).

<sup>73</sup> See *id.* (stating that “[b]y rejecting Behr’s request to proceed under the provisions of Section 1.110, the Bureau effectively barred Behr from having any right of appeal whatsoever”).

the other. Certainly, we did not need to act in any particular way on the waiver request (whether to grant or deny it, in whole or in part, or simply to defer acting on it) to consider whether to approve the requested modification of the license elements that Behr identified for change in his modification application. Nor did Behr condition the license modifications he requested on grant of a waiver of the construction rule. Indeed, we would have no logical reason to assume that action on the waiver request would have any bearing on Behr's interest in keeping his license up-to-date on the designated contact person, foreign ownership information, and the type of service he planned to offer under the license. In short, the only link between the license modification application and the waiver request was the incidental inclusion of Behr's request for waiver of the construction rule as an attachment to the license modification form. Under these circumstances, the full grant of all the modifications of license requested in the application does not constitute the partial or conditional grant of an application that would provide any hearing rights under Section 1.110, or otherwise trigger the operation of that rule, simply because the Commission did not grant a rule waiver request that the applicant associated with the application.

23. The Commission's action upheld by the court in *Buckley-Jaeger v. FCC*, reflects this approach, insofar as none of the relevant considerations for acting on the renewal application in that case depended on the Commission's consideration of or action on the applicant's request for an exemption from the program duplication rule. Grant of the renewal application simply extended for an additional period of time the terms and conditions of the authorization that the licensee had accepted when its application was initially granted. Because a determination of whether the licensee in that case was entitled to an exemption of the program duplication rule had nothing directly to do with any element of the licensee's request that its license be renewed, and because the Commission could grant a full license renewal without placing any conditions on the license or deviating from the renewed license that the licensee had requested, the Commission correctly treated the renewal grant as a full grant of the renewal application, not as a partial application grant that could entitle the licensee to a hearing on the unconnected issue of whether the licensee was entitled to an exemption from the program duplication rule.

24. In the present case, grant of Behr's modification application approved his request to make certain changes in the factual underpinnings of his license – all within the rules – by allowing him to add a contact person to his license, provide answers regarding foreign ownership, and change the licensed station class so that he could provide interconnected service, all while maintaining the other license terms and conditions he accepted upon initial grant. Whether the Commission would grant a waiver of the rules to give Behr the 10-year construction period afforded Phase II 220 MHz geographically licensed systems was not contingent on or otherwise related to any of these changes in the elements of Behr's license. As in *Buckley-Jaeger v. FCC*, Behr's filing contained two separate, independent types of request – one type constituted the application to correct and modify, within the parameters of the current rules, the administrative and technical aspects of the license, while the other type sought relief apart from the specific terms of the license (*i.e.*, to obtain waiver of the build-out schedule set out in the Commission's rules).

25. Given our rejection of Behr's argument that he received a partial grant, Behr offers no convincing explanation why he could not have filed an application for review or a petition for reconsideration of the Mobility Division's denial of his waiver request instead of, or in addition to, his Section 1.110 letter rejecting the grant of his license application. Indeed, in light of *Buckley-Jaeger v. FCC*, Behr should have realized that Section 1.110 may not apply and that he should protect his options by filing an application for review or petition for reconsideration in addition to his Section 1.110 filing. The filing of an application for review or petition for reconsideration would not impair his opportunities under Section 1.110 in the event that the Commission agreed that Section 1.110 applied to Behr's case, nor would the Section 1.110 filing undercut his application for review or petition for reconsideration if Section 1.110 proved inapplicable.

26. We also find inapposite the cases Behr cites to support his contention that his modification application was not granted in full so that Section 1.110 provided the only procedural avenue for him to follow. Citing *Murray Hill Broadcasting Company*,<sup>74</sup> Behr points out that the Commission noted that “an applicant may not, on the one hand, accept a Commission grant and, on the other hand, seek an administrative appeal of the authorization.”<sup>75</sup> Behr also quotes the court in *Central Television, Inc. v. FCC*,<sup>76</sup> as saying that “[a]cceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant’s issuance.”<sup>77</sup> Behr further contends that “[t]o underscore the importance of this point, the court in *Mobile Communications v. FCC*,<sup>78</sup> held that an applicant would normally be barred from seeking judicial review of the Commission’s actions if it failed to follow the mandatory administrative exhaustion requirement of rejecting the grant as made.”<sup>79</sup> Finally, Behr asserts that the court in *Tribune Company v. FCC*<sup>80</sup> “insisted that, absent futility, an applicant was required to implement the procedures of Section 1.110 when the Commission granted its assignment application but denied the associated cross-ownership waiver.”<sup>81</sup>

27. While Behr accurately quotes statements from the first two cases, *Central Television, Inc. v. FCC* and *Murray Hill Broadcasting Company*, those facts are easily distinguishable from the Behr fact pattern. Behr’s modification application was granted without condition. Both *Central Television, Inc. v. FCC* and *Murray Hill Broadcasting Company*, however, involve applications that were granted contingent only on each applicant’s agreement to specific conditions. In both cases, the applicants first accepted the conditional grants, and later attempted to appeal the conditions attached to the grants as made. The appeals were rejected because the applicants did not comply with the procedural requirements of Section 1.110.

28. In *Central Television, Inc. v. FCC*, the Commission granted an application to assign a broadcast construction permit subject to the condition that no settlement payments were made in excess of \$100,000 called for in the assignment contract.<sup>82</sup> Nearly two months later, the parties completed the assignment and the assignor received the maximum compensation allowed under the grant.<sup>83</sup> As the court described, having secured this benefit, authorized by a Commission ruling that clearly conditioned the assignment on accepting no additional compensation, the assignor appeals “now asserting its right to additional compensation.”<sup>84</sup> Finding this position untenable, the court dismissed the appeal for lack of jurisdiction because the parties to the assignment failed to comply with Section 1.110 of the Commission’s rules for challenging a conditional grant.<sup>85</sup> The court further explained that it had

<sup>74</sup> In re Application of Murray Hill Broadcasting Company for a Construction Permit for Minor Changes in Station WQMG-FM, Greensboro, North Carolina, *Memorandum Opinion and Order*, 8 FCC Rcd 325 (1993) (*Murray Hill Broadcasting Company*).

<sup>75</sup> 2007 Petition at 2 (quoting *Murray Hill Broadcasting Company*, 8 FCC Rcd at 327, ¶ 19).

<sup>76</sup> *Central Television, Inc. and WTVW, Inc.* 834 F.2d 186, (D.C. Cir. 1987) (*Central Television, Inc. v. FCC*).

<sup>77</sup> 2007 Petition at 2 (quoting *Central Television, Inc. v. FCC*, 834 F.2d at 190).

<sup>78</sup> *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (*Mobile Communications v. FCC*).

<sup>79</sup> 2007 Petition at 2.

<sup>80</sup> *Tribune Company v. FCC*, 133 F.3d 61 (D.C. Cir. 1998).

<sup>81</sup> Application for Review at 6.

<sup>82</sup> *Central Television, Inc. v. FCC*, 834 F.2d at 189.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 190. The additional compensation involved consultancy payments in the amount of \$475,000 that staff found violated Commission rules. *Id.* at 189.

<sup>85</sup> *Id.* at 191.

previously “upheld the FCC’s authority to require applicants either to accept a conditional grant or reject it and make a timely request for a full hearing. Section 1.110 does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions.”<sup>86</sup>

29. In *Murray Hill Broadcasting Company*, the licensee filed an application to relocate a short-spaced broadcast station and to increase the authorized antenna height and power limits.<sup>87</sup> After the application was dismissed because the proposed power level exceeded the maximum allowed, the licensee filed a petition seeking reconsideration of the dismissal, arguing that staff had erred and that, in any event, a waiver of the base station separation requirements was justified. If staff once again rejected its original proposal, the licensee proffered an amendment to its application proposing a power level that would comply with Commission rules.<sup>88</sup> Staff granted reconsideration to the extent it approved the licensee’s amended proposal to operate at the lower power level.<sup>89</sup> Even though the licensee filed an application for review objecting to the conditions of the grant, it made the authorized modifications to its station, filed an application for a covering license, which was granted, and began operating at the lower power level in accordance with its amended proposal.<sup>90</sup>

30. The Commission denied the application for review substantively, finding the staff action granting reconsideration to the extent that it approved the licensee’s amended power level proposal was proper.<sup>91</sup> The Commission also concluded that dismissal of the initial application was proper and that waiver of its rules to allow the power level proposed in the licensee’s initial application was not justified.<sup>92</sup> The Commission found, as an independent procedural basis for rejecting the application for review, that the licensee failed to challenge the terms of the conditional grant of the amended application according to the procedure prescribed in Section 1.110.<sup>93</sup> Behr, in his 2007 Petition, asserted that *Murray Hill Broadcasting Company* “stands unequivocally for the proposition that an applicant may not follow the procedure suggested in the [*Order on Reconsideration*] (i.e. seeking reconsideration or filing an application for review) when an application including a waiver has been granted without the waiver.”<sup>94</sup> The application that was granted in *Murray Hill Broadcasting Company*, however, did not require waiver of the power level requirements.

31. Again, in *Murray Hill Broadcasting Company*, grant of the amended application was contingent on whether the applicant agreed to the lower power level proposed in its amended application as an alternative to the level originally proposed in its initial application. The Commission found that Section 1.110 was triggered because the staff granted the licensee’s amended proposal to operate at a lower power level, a term to which the licensee objected. As the Mobility Division stated in its *Order on Reconsideration*, contrary to Behr’s assertion, the Commission’s denial of the request for waiver of the power level proposed in the licensee’s initial application in *Murray Hill Broadcasting Company* had no bearing on the licensee’s procedural options with regard to its amended application in that case.<sup>95</sup>

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<sup>86</sup> *Id.* at 190.

<sup>87</sup> *Murray Hill Broadcasting Company*, 8 FCC Rcd at 325, ¶ 4.

<sup>88</sup> *Id.* at 325, ¶ 6.

<sup>89</sup> *Id.* at 326, ¶ 7.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 327, ¶ 20.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 327, ¶ 19.

<sup>94</sup> 2007 Petition at 2.

<sup>95</sup> *Order on Reconsideration*, 24 FCC Rcd at 7199, ¶ 7.

32. Behr is apparently attempting to avoid the circumstances of these cases where the applicants clearly accepted the conditions granted and only later sought appeal of those very conditions. Unlike Behr's modification application, however, in neither of these cases could the applications have been granted absent agreement to the conditions associated with the grants. In *Central Television, Inc. v. FCC*, grant of the assignment application was allowed only upon agreement to the conditions regarding compensation under an assignment contract. In *Murray Hill Broadcasting Company*, grant of the modification application depended on acceptance of the lower power level proposed in the licensee's amended application.

33. In this case, in granting Behr's modification application without condition, Commission staff modified Behr's license to the precise extent that Behr had requested in his application as originally filed. Staff authorized the amended contact information, accepted the answers to the foreign ownership questions, and authorized interconnected service, all without conditions. Behr did not receive less than the modified license for which he had applied.

34. Finally, *Mobile Communications v. FCC*, and *Tribune Company v. FCC*, also cases that involve conditional grants of applications, address when court review is appropriate under Section 402(b) of the Communications Act. Section 402(b) permits, in relevant part, appeals from Commission orders to the court of appeals regarding an application for a construction permit or an assignment application, where the application is denied by the Commission.<sup>96</sup> In both cases, the initial issue was whether the court had jurisdiction where the Commission had granted the applications at issue, albeit contingent on certain "unrequested" conditions. The court decided that when the Commission grants an application subject to some condition that the applicant did not request, the application has been denied for purposes of judicial review under Section 402(b).<sup>97</sup>

35. The court, however, rejected Tribune Company's argument that Section 1.110 was inapplicable because, according to Tribune, even though the Commission had granted its application with conditions, its application had, in effect, been denied. The court explained that Section 1.110, unlike Section 402(b), is written to specifically deal with a conditional grant and "it could not be clearer that it covers the present case."<sup>98</sup> The court further stated that just because a partial grant is a denial for purposes of Section 402(b)(3) does not mean that the same reasoning applies to Section 1.110.<sup>99</sup> The

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<sup>96</sup> 47 U.S.C. §§ 402(b)(1) and (3).

<sup>97</sup> *Tribune Company v. FCC*, 133 F.3d at 66 (citing *Mobile Communications v. FCC*, 77 F.3d at 1404). In *Mobile Communications v. FCC*, Mobile Telecommunications Technologies Corp. (Mtel) sought a finder's preference license that would have been awarded without charge under then-applicable law. 77 F.3d at 1403. Before the Commission ruled on Mtel's application, Congress amended the Communications Act to require payment for licenses, so the Commission imposed a charge on Mtel's license. *Id.* The court of appeals determined that Mtel's application was properly viewed as being for a free license rather than a license subject to any condition. By awarding a license subject to a condition of payment, the court found the Commission in effect denied that application for purposes of Section 402(b)(1). *Id.* at 1404.

In *Tribune Company v. FCC*, Tribune Company sought to acquire control of a broadcast TV station license where the contour of the TV station encompassed the entire community in which the newspaper was published in violation of the Commission's daily newspaper cross-ownership rules. 133 F.3d at 64. The Commission granted the assignment application subject to a condition that Tribune divest itself of one of its media outlets within one year of the grant. *Id.* The court, in reviewing its statutory jurisdiction over the proceeding, concluded that Tribune's application was denied for purposes of Section 402(b)(3). *Id.* at 66.

<sup>98</sup> *Tribune Company v. FCC*, 133 F.3d at 66.

<sup>99</sup> *Id.* Behr's assertion in his Application for Review that *Tribune Company v. FCC* involved an assignment application where the associated request for waiver was denied, *see supra* text accompanying note 81, is an inaccurate reading of the facts of the case. The application at issue did not include a request for waiver, but was granted with conditions. Only after Tribune Company accepted the conditional grant did it seek waiver of the Commission's daily newspaper cross-ownership rules. In particular, in that case, Tribune Company, which

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court further stated in both cases that a party whose license application has been denied by approval subject to conditions (other than ones requested by the applicant) must normally comply with Section 1.110.<sup>100</sup> While the court in these cases discusses review under Section 402(b) of the Communications Act and review under Section 1.110 of our rules, each case again involves an application that could be granted contingent only on the applicant's agreeing to certain conditions, *i.e.* terms to which the applicants objected.

36. Finally, Section 1.925(b) of our rules provides that “[r]equests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.”<sup>101</sup> Section 1.925(c)(ii) provides that “[d]enial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested.”<sup>102</sup> Citing Section 1.925(b), Behr argues that he was required to submit his waiver request along with an application.<sup>103</sup> Behr also cites Section 1.925(c)(ii) of our rules to suggest that the rule “seemed to require the application to be denied – which would have permitted a straightforward appeal of the Bureau’s action.”<sup>104</sup>

37. First, Section 1.925(b) is a procedural requirement that does not relieve a filer of its obligation to meet deadlines for seeking reconsideration of an action. Moreover, we note that Section 1.925(c)(ii) addresses situations in which waiver requests have been denied, and provides that in those cases, if an “alternative proposal” has been submitted that fully complies with our rules, the underlying applications will be processed using the alternative proposal. The rule section also addresses the situation where it is necessary to consider the associated waiver request in connection with the application.<sup>105</sup> We

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published newspapers in Fort Lauderdale, Florida, filed an application to acquire six television station licenses. *Tribune Company v. FCC*, 133 F.3d at 64. Because one TV station’s Grade A contour encompassed the entire Fort Lauderdale community, Tribune’s newspaper and the TV station were in the same primary market, and the daily newspaper cross-ownership rule prohibited their common ownership. *Id.* Upon granting the assignment application, the Commission also granted Tribune temporary waiver of the rule, which allowed Tribune to take possession of the TV station, but conditioned the grant on Tribune’s divesting itself of the TV license or the newspaper within one year of the grant of the application. *Id.* After accepting the grant, Tribune sought a permanent waiver of the rule. *Id.* at 65.

<sup>100</sup> *Id.* at 67 (citing *Mobile Communications v. FCC*, 77 F.3d at 1404).

<sup>101</sup> 47 C.F.R. § 1.925(b).

<sup>102</sup> *Id.* § 1.925(c)(ii).

<sup>103</sup> Application for Review at 4.

<sup>104</sup> *Id.* at 4-5.

<sup>105</sup> *See, e.g.*, In the Matter of State of Florida, *Order*, 22 FCC Rcd 1782 (PSHSB 2007) (dismissing applications to operate on “offset” short-spaced channels after denying the associated request for waiver of the Commission’s short-spacing rules); In the Matter of Application of City of Crystal Lake, Illinois, *Order*, 18 FCC Rcd 2498 (WTB PSPWD 2003) (dismissing an application to operate on a microwave link frequency using a bandwidth of 8 MHz after denial of the request for waiver of the rule that allows bandwidths only from 625 kHz to 2.5 MHz for that frequency); In the Matter of Midport Electronics, Inc., *Order*, 17 FCC Rcd 13778 (WTB PSPWD 2002) (dismissing an application to relocate base stations outside distances permitted after denial of a request for waiver of the rule that confines the location of base stations to within 50 miles of the geographic center of Detroit, Michigan); In the Matter of Applications for Consent to Assignment of Private Land Mobile Radio Authorizations From Lotus Development Corp. and Sequent Computer Systems, Inc. to IBM Research and Development, Inc. International Business Machines Corp., *Order*, 16 FCC Rcd 5209 (WTB PSPWD 2001) (dismissing assignment applications that require the signature of a director, officer, or authorized employee of the assignor, after denial of the request for waiver of the signature requirement to allow an employee of the assignee to sign for the assignor after the assignment has already been completed and where the assignor has become the assignee’s subsidiary); In the Matter of the Application of Southwestern Public Service Company, *Order*, 15 FCC Rcd 11010 (WTB PSPWD 2000) (dismissing

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believe it would be illogical and contrary to administrative efficiency to read this rule as requiring the dismissal of an application where it is not necessary to consider the attached waiver request in connection with the application.<sup>106</sup>

38. Grant of Behr's modification application was not a conditional grant, nor was the denial of Behr's request for waiver contingent on or otherwise related to any change in the elements of his modification application. Rather, Behr received a fully granted modification application and a separate denial of his waiver request. Accordingly, we affirm the Mobility Division's *Order on Reconsideration*, which correctly concluded that under *Buckley-Jaeger v. FCC*, Section 1.110 does not apply in these circumstances, and properly denied Behr's reconsideration petition.

#### **B. Behr's Request for Waiver of the Phase I 220 MHz Construction Rules**

39. Behr also includes as an issue for review whether the Licensing and Technical Analysis Branch's *Waiver Denial Letter* erred substantively by not granting his request for waiver of the Phase I non-nationwide construction requirements.<sup>107</sup> In his waiver request, Behr asked the Commission to completely waive the Phase I non-nationwide construction requirements applicable to single-station licenses awarded through lottery. Phase I licensees were required, within one year of license grant, to construct a single base station under the authorized technical parameters (with no requirement to meet a specific population coverage benchmark) and to place the station in operation (defined as base station interaction with at least one mobile station) within that time frame.<sup>108</sup> To construct his single base station, Behr requested a tenfold increase in the overall time frame for buildout, to match the amount of time afforded the much wider-reaching Phase II EA licenses acquired through competitive bidding, *i.e.* Behr sought five years to cover one-third of the population of his station's service area, and 10 years to cover two-thirds of the population of the station's service area. Citing the *220 MHz Second Report and Order*, in which the Commission allowed Phase I non-nationwide licensees to relocate their base stations and to construct "fill-in" stations, Behr asserted that "the Commission decided to effectively turn Phase I non-nationwide licenses into geographic [area] licenses."<sup>109</sup> Behr then contended that "having brought Phase I licensees into the modern regulatory model ..., the Commission neglected to revisit the now outdated and anomalous 12-month construction period which still applied to those licensees."<sup>110</sup> Behr concluded that "[g]rant of this waiver will put Behr on equal footing with the other similarly situated licensees."<sup>111</sup>

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an application to operate on common carrier channels after denial of a request for waiver to provide private radio services on those common carrier channels); In the Matter of Greenline Partners, Inc., *Order*, 14 FCC Rcd 17369 (WTB CWD 1999) (dismissing 100 applications to construct 100 transmitters to operate on a paging frequency on a nationwide exclusive basis, after denial of a request for waiver of the rule requiring a paging system to consist of 300 or more transmitters to obtain nationwide exclusivity on that frequency).

<sup>106</sup> See *supra* text accompanying note 64 (where the Commission explained in the underlying case to *Buckley-Jaeger v. FCC* that it was not necessary to consider the licensee's exemption request in connection to its renewal application).

<sup>107</sup> Application for Review at 6.

<sup>108</sup> 47 C.F.R. § 90.155(a) and (c).

<sup>109</sup> Waiver Request at 3. Later in his Waiver Request, Behr added that "[a]s noted above, the FCC effectively and deliberately converted Phase I licenses to the same geographic footing as regional and EA 220 MHz licenses when it authorized approval-less construction of multiple sites within a Phase I licensee's defined license boundary." *Id.* at 5.

<sup>110</sup> *Id.* at 3-4.

<sup>111</sup> *Id.* at 5.

40. Behr now asks the full Commission to directly review his request for waiver. We reject this request, however, and let the Wireless Bureau's *Waiver Denial Letter*<sup>112</sup> stand on the ground that Behr did not submit a petition for reconsideration or an application for review of the denial of his request for waiver of the Phase I construction requirements. Section 405(a) of the Communications Act, as implemented by Section 1.106(f) of the Commission's rules, requires that a petition for reconsideration be filed within 30 days from the date of public notice of Commission action.<sup>113</sup> Section 1.106(f) of the Commission's rules more specifically provides that a "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b)."<sup>114</sup> Our procedural rules under Section 1.115 also require applications for review to be filed within 30 days of public notice of the relevant action.<sup>115</sup>

41. The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission is without authority to extend or waive the statutory 30-day period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act,<sup>116</sup> except where "extraordinary circumstances indicate that justice would thus be served."<sup>117</sup> We note the filing requirement of Section 405(a) of the Act applies even if the petition for reconsideration is filed only one day late.<sup>118</sup> Behr's request for waiver was denied by letter dated November 12, 2003. The deadline for filing a petition for reconsideration or application for review was December 12, 2003. Behr neither sought reconsideration by the deadline nor requested that we waive the filing deadline for seeking such reconsideration. Moreover, there is no factual basis in the record to support a finding of extraordinary circumstances that could justify deviating from the statutory deadline for filing petitions for reconsideration, and the record is similarly devoid of any basis for waiving the deadline for filing applications for review. Accordingly, in rejecting Behr's request at the current stage of this proceeding for a substantive review of his original request for a waiver of the construction deadline, we need not and do not rely on the substantive infirmities of the arguments Behr has raised to support his request for more time to meet his construction obligations.

42. With respect to the extraordinary considerations required to waive the statutory deadline for filing petitions for reconsideration, we observe that Behr has not made any showing that such circumstances are present in his case. The most we can discern on this count from his filings is the suggestion that it was reasonable to forego seeking reconsideration because of his belief that the only way he could preserve his rights was by following Section 1.110 procedures. For the reasons set forth above, it is clear that Behr, who was represented by competent communications counsel, had no reasonable basis

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<sup>112</sup> See *supra* note 40 (citing the *Waiver Denial Letter* issued by the Wireless Bureau's Technical Analysis Branch of the Commercial Wireless Division).

<sup>113</sup> 47 U.S.C. § 405(a).

<sup>114</sup> 47 C.F.R. § 1.106(f).

<sup>115</sup> See 47 U.S.C. § 155(c)(4) (providing that "[a]ny person aggrieved by any ... order, decision, report or action [under delegated authority] may file an application for review by the Commission within such time frame and in such manner as the Commission shall prescribe"); 47 C.F.R. § 1.115(d) (providing that an "application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b)").

<sup>116</sup> See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

<sup>117</sup> See *Reuters*, 781 F.2d at 952 (holding that express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Gardner*, 530 F.2d at 1091 (excepting where "extraordinary circumstances indicate that justice would thus be served").

<sup>118</sup> See, e.g., *Panola Broadcasting Co.*, *Memorandum Opinion and Order*, 68 F.C.C. 2d 533 (1978) (dismissing a petition for reconsideration that was filed one day after the statutorily allotted time for filing requests for reconsideration); *Metromedia, Inc.* *Memorandum Opinion and Order*, 56 F.C.C. 2d 909 (1975) (same).

for concluding that Section 1.110 applied to his case or that he had no other options to secure his rights to redress than the course of action he took.<sup>119</sup> Moreover, there is nothing else in this proceeding – extraordinary or otherwise – that would justify looking past the strict petition for reconsideration filing requirements.<sup>120</sup>

43. While the deadline for filing an application for review is not mandated by statute,<sup>121</sup> there is similarly no basis in the record that could justify waiving that deadline. Behr never filed an application for review of the November 12, 2003 *Waiver Denial Letter* that directly denied his request for waiver, and he never requested additional time for doing so.<sup>122</sup> Accordingly, we have no basis under the review provisions of Section 1.115 to revisit the substantive merits of Behr’s underlying request for waiver of the construction rule.<sup>123</sup> That said, we observe that even were we to examine the factual assertions that Behr has made to justify additional time to build – whether the ten more years that Behr requested or any smaller amount of time – we see nothing in those assertions or in the way the Wireless Bureau handled them that would have warranted grant of the requested relief. For example, the determination in the *Waiver Denial Letter* that Behr had failed to show that his single site-specific license awarded through lottery was “as equally complex to construct as a Phase II license,” and that “[g]eographic area licenses, therefore, are inherently more complex with regard to construction issues,” was logical and well supported.<sup>124</sup> Nor does the record contain any underlying facts specific to Behr’s case that, collectively, could conceivably have supported a decision to provide Behr with additional time to meet his

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<sup>119</sup> See *supra* ¶¶ 17-38 (demonstrating that applicable precedent such as *Buckley-Jaeger* clearly teaches that Section 1.110 does not apply to the Wireless Bureau’s denial of Behr’s request for waiver of the construction deadline, that Behr could have secured his rights by filing a timely petition for reconsideration or application for review, and that, even in the event he perceived any ambiguity in the appropriate procedural vehicle for redress, he could have preserved all his options by filing a petition for reconsideration or application for review in addition to a Section 1.110 pleading).

<sup>120</sup> In this regard, we note that the errors predating the grant of Behr’s license have no relevance to his subsequent failure to preserve his rights to contest the Wireless Bureau’s determination that he had failed to comply with one of the most basic obligations for holding a license – *i.e.*, constructing the station on a timely basis.

<sup>121</sup> See, e.g., Charles T. Crawford et al., *Order*, 17 FCC Rcd 2014, 2019 n.44 (2002) (*Crawford*) (observing that “[t]ime limitations on the filing of Applications for Review are established solely by Commission rule”).

<sup>122</sup> Behr’s attempt to resurrect his substantive arguments for waiver of the construction rule in the pending Application for Review (filed in 2009 as a culmination of Behr’s challenge to the Wireless Bureau’s Section 1.110-related action) constitutes, at best, an attempt – *six years* after the fact – to seek review of the 2003 *Waiver Denial Letter*.

<sup>123</sup> See *Crawford*, 17 FCC Rcd at 2019 n.44 (holding that “no waiver [of the deadline for filing an application for review was] warranted” because the party had “neither explained his failure to file a timely application for review nor requested a waiver of the filing deadline”).

<sup>124</sup> *Waiver Denial Letter* at 2. In particular, the letter explained that “[s]ervice in Phase I licensed areas may be provided by a single site unlike geographic areas which cover a much larger land area,” and that “geographic area licenses are assigned a larger block of frequencies and are required to build around incumbent stations.” *Id.* Behr was essentially asking for the same amount of time to construct a single base station (with coverage of approximately 2,500 square miles) as an EA licensee receives for constructing a sufficient number of stations to cover an area that is on average 20,000 square miles in size. See *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 221, n.100. As the Commission has explained, by providing 120 km co-channel protection for Phase I non-nationwide 220 MHz stations based on the provision of 10 dB protection to the station’s 38 dBuV/m field strength contour, stations operating at maximum power and antenna height would “produce a service area with a 38 dBu contour at about 45 kilometers (28 miles).” *220 MHz Second Report and Order*, 11 FCC Rcd at 3669, ¶ 5. Based on that calculation, the Commission found that Phase II EAs would, on average, be eight times larger than the service area of a Phase I non-nationwide station. *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 220-21, ¶ 18.

construction obligations.<sup>125</sup> Similarly, we reject the notion that any purported flaw in the Commission's 1996 rulemaking decision to keep in place the 12-month construction deadline for Phase I non-nationwide licensees provides a basis for modifying Behr's 12-month construction deadline.<sup>126</sup>

44. In sum, because Behr did not meet the respective deadlines for filing a petition for reconsideration or an application for review of the *Waiver Denial Letter* (both December 12, 2003) – and because this case presents no circumstances, extraordinary or otherwise, that call into question the propriety of giving force to these deadlines – we deny Behr's request in the present Application for Review for substantive review of the *Waiver Denial Letter* and, accordingly, we let that letter order stand.<sup>127</sup>

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<sup>125</sup> We note that in waiver cases – which are handled on a case-by-case basis – the burden of proof rests with the petitioner to plead specific facts and circumstances that would make the rule inapplicable. *Tucson Radio, Incorporated (KEVT) v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971). Behr, however, failed to introduce into the record any plan for proposed operations to serve customers or any evidence of circumstances preventing him from meeting the applicable construction deadline. Nor did Behr cite any involuntary loss of site or other circumstances beyond his control that might have justified an extension of time, *see, e.g.*, 47 C.F.R. §§ 1.946(e), 90.155(g), even for a more targeted period (*e.g.* a two-year extension of time to construct), and while Behr argued that other 220 MHz non-nationwide licensees received extensions of their construction deadlines, Waiver Request at 2, he provided no specific facts to explain why ten years is necessary to construct a single station license. Rather, Behr equated his situation to the Phase II geographic area licensees solely on the basis that the Commission had adopted new rules for such licensees operating in the same 220 MHz band he was licensed to operate in, notwithstanding that his license authorized much more limited operations and required much less buildout. *See 220 MHz Third Report and Order*, 12 FCC Rcd at 11008, ¶ 139 (distinguishing between the Phase I and Phase II licensing regimes, stating that “Phase I non-nationwide licensees are not authorized to operate within a particular geographic area, but instead are authorized to construct a single land mobile base station for base/mobile operations”). Thus, Behr's assertions that the Commission had effectively converted the Phase I licensees into comparable geographic licensees is patently erroneous.

<sup>126</sup> We note that in attempting to discredit the rationality of the Commission's rulemaking decision to keep the 12-month construction deadline in place for Phase I licensees, Behr asserted that the Commission “neglected to revisit the now outdated and anomalous 12-month construction period which still applied to [Phase I] licensees.” Waiver Request at 3-4. In fact, the Commission made a considered decision to retain this construction period in modifying Section 90.725(f) to allow more flexibility in defining whether a licensee has placed its station in operation. *See 220 MHz Second Report and Order*, 11 FCC Rcd at 3676, ¶¶ 30-31; *see also* 47 C.F.R. § 90.757(a) (providing that “a Phase I non-nationwide licensee that is granted modification of its authorization to relocate its base station must construct its base station and place it in operation, or commence service, on all authorized channels on or before August 15, 1996, or within 12 months of initial grant date, whichever is later”).

<sup>127</sup> Thus, we reject on procedural grounds Behr's attempt in the present Application for Review to revisit the merits of his request for waiver of his construction obligations; Behr's failure to seek reconsideration or review of the Wireless Bureau's *Waiver Denial Letter* constitutes a fatal procedural infirmity that has cut off any right of review of these underlying merits, and our rejection of his current request for such review is independent of any discussion herein of the merits. *See BDPSC, Inc. v FCC*, 351 F.3d 1177, 1182-84 (D.C. Cir. 2003) (explaining that a court must affirm an agency decision properly dismissing a suit on procedural grounds regardless of the agency's consideration of the substantive merits).

**IV. ORDERING CLAUSE**

45. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 5(c) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and 405(a), and Sections 1.106 and 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106 and 1.115, that the Application for Review filed by Lawrence Behr on June 19, 2009 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary